87-1407

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987

City of Philadelphia and Commissioner, Philadelphia Department of Public Property,

Petitioners,

v.

Disabled In Action of Pennsylvania, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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QUESTION PRESENTED

Whether the Court of Appeals correctly agreed with the United States Department of Transportation that accessibility regulations, Subpart C of 49 C.F.R. Part 27, had to be satisfied in order to comply with Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and whether the Court of Appeals correctly determined as a factual matter that the City did not make accessible a subway station entrance "to the maximum extent feasible," 49 C.F.R. § 27.67(b), when the the City substantially altered the station's stairs and entrances in a manner that "affects or could affect accessibility" of the station, id.

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City of Philadelphia and Commissioner, Philadelphia Department of Public Property,

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v.

Disabled in Action of Pennsylvania, on behalf of its members and Hugh Young, John De Angelo, James Falls, Michael Lohr, Dena Scott, Walter Place, Stephen Margolis, Joyce Brock, and Wendy Elliot-Vandiver, on behalf of themselves and all others similarly situated,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF OF DISABLED IN ACTION, et al. IN OPPOSITION TO THE PETITION

Respondents Disabled in Action of Pennsylvania, on behalf of its members, and Hugh Young, John DeAngelo, James Falls, Michael Lohr, Dena Scott, Walter Place, Stephen Margolis, Joyce Brock, and Wendy Elliott-Vandiver, on behalf of themselves and all others similarly situated, request that the Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Third Circuit in this case.

The Court of Appeals issued its unanimous Opinion and Order on November 23, 1987 which is reported at 833 F.2d 1113 (3d Cir. 1987). The memoranda and order of the United States District Court for the Eastern District of Pennsylvania is not reported.

STATEMENT OF FACTS

Respondents are disabled persons and organizations of disabled persons who use wheelchairs.

The City of Philadelphia has received more than $500,000,000 in federal funds to build, reconstuct, or alter various public transportation stations and projects since 1971. Newly constructed stations, for example, the Market-East Commuter rail station and the airport stations already are fully accessible to persons who use wheelchairs. Since 1979, the year when the federal regulation in question was promulgated, Petitioners have reconstructed only one subway station--at Columbia Avenue/Temple University--the one in dispute.

Even though mobility disabled persons and students may ride on the accessible subway cars, since they have fold-away seats and securing devices for wheelchairs, the Columbia Avenue/Temple University Station is not accessible. Disabled students and neighborhood residents who use wheelchairs must be carried up and down the Columbia Avenue station's stairs to ride the subway trains. At other stations that have elevators or ramps, disabled persons easily gain access to trains and have no difficulties.

The Columbia Avenue/Temple University station is a major station in the City and the only one serving the largest campus in the metropolitan area. There are hundreds of students who use

wheelchairs who live on campus or attend classes there.

Petitioners spent $5.3 million on the Columbia Avenue/Temple University subway station reconstruction, of which $4.3 was federal financial assistance. They completely demolished the existing stairs at one entrance and either entirely built new stairs or significantly reconfigured or altered existing stairs at each of the other three subway station's entrances.

The City wrote to the United States Department of Transportation (DOT) on May 11, 1983, that the Columbia Station project "provide[s] for the complete renovation of the station," including "the new station, headhouse, complete structural changes, new stairs, and a new

escalator" (emphasis added).[1] In addition, new ballustrades were constructed around the opening of the stairways, and new ornamental handrails, glazed wall tiles, and new floor finishes were added. The end product is a work of art.

The factual dispute in the lower court was whether the altered and reconfigured portions of the facility were an "entrance" to the station and whether the totally altered and reconstructed "entrance" was made accessible "to the maximum extent feasible," as required by the DOT rule. The Court, referring to evidentiary

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[1] Although the plans for the renovation originally provided for wheelchair accessibility via an elevator, its construction was eliminated in the course of the planning process but the shaftway was maintained.

exhibits that had been introduced in the district court, stated that "[s]everal photographs depicting the renovated areas ... have enhanced our understanding of the nature and extent of the station renovation project. The defendants have adduced nothing to controvert the plaintiffs' evidence" (A-14-15).

As a factual matter, the Court of Appeals concluded: "[w]e think it is beyond cavil that the areas in question are entrances to the station" and "[b]ased on the record before us, there is no question that it was 'feasible' to effect the alterations ... in such a manner that ... 'at least the primary entrance'" could have readily been made accessible (A-16).

The Court of Appeals granted partial summary judgment with respect to the

northeast entrance to the northbound terminal -- the entrance with the most extensive alterations and reconstruction. With regard to the other entrances, the Court of Appeals remanded the action and wrote "[i]t is not entirely clear from the evidence of record whether the renovation of other entrances ... amounted to normal maintenance of existing stairs or constituted an 'alteration' ... substantial enough ... to afford an opportunity to make one entrance to the southbound terminal usable by persons in wheelchairs" (A-17).

REASONS FOR DENYING THE WRIT

I. The Decision of the Court of Appeals Is Completely Consistent With The Previous Decisions Of This Court and With the DOT Interpretation of Its Own Regulations and Does Not Raise Any Important Questions That Would Justify Review By The Court.

1. It is important to correct Petitioners' misleading characterization of the scope of this case. The only question of law before the Court of Appeals was whether both Subpart C and D of 49 C.F.R. Part 27 apply. On that legal issue, the Petitioners allege that "The Third Circuit Erroneously Refused to Follow the Department of Transportation's Interpretation of Its Own Regulation" (A-8). That is both incorrect and quite disingeneous.

As a question of law, DOT actually advised the Court of Appeals in its amicus curiae brief that "[i]t is clear

that subparts C and D of DOT's regulation, 49 C.F.R. Part 27, established separate, independent criteria for compliance with the regulation and both sets of requirements must be satisfied" (A-48).

The Court below completely deferred to and agreed with DOT and held that "[w]e find nothing clearly erroneous or inconsistent in DOT's interpretation that Subparts C and D of the regulation, 49 C.F.R. Part 27, established separate, independent criteria for compliance with the regulation and both sets of requirements must be satisfied. Consequently the DOT's [legal] interpretation is controlling" (A-12).[2]

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[2]Earlier in the opinion, the Circuit noted that "[t]he DOT interpretation is that Subparts C and D of 49 C.F.R. Part 27 establish separate, independent criteria and, in order to comply with the

Therefore, contrary to Petitioners' statement, the lower court did not refuse to follow DOT's interpretation, but agreed with it entirely.

Subpart C, the specific regulation on which Respondents rely, states:

> Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient ... in a manner that affects or could affect the accessibility of the facility or part of the facility, shall, to the maximum extent feasible, be altered in such a manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

49 C.F.R. § 27.67(b)(emphasis added).

It is at the least very unfair for Petitioners to state that "the court disregarded DOT's interpretation."

DOT regulations and Section 504 of the Rehabilitation Act, the requirements set forth in both subparts must be satisfied" (A-10).

(Petition for Writ of Certiorari at 8). As a legal construction, both the Court of Appeals and DOT agreed that a recipient of federal assistance had to comply with this regulation. The only disagreement between the Court of Appeals and DOT was on the application of this regulation to the facts in the present case.

Petitioners play a slight of hand when they say the "court of appeals erred by not applying the appropriate standard when reviewing an agency's interpretation of its own regulation." (Id. at 9). The Court totally deferred and agreed with DOT's legal interpretation of the regulation. That is quite different than a factual difference.

2. Petitioners want the Writ of Certiorari to be granted so that this

Court can determine whether -- as a factual matter -- there was a disagreement between DOT and the Court of Appeals.[3] That is, this Court would decide as a question of fact whether the alterations were to an "entrance" of a facility and whether the alterations were made accessible "to the maximum extent feasible." As part of answering these questions, the regulation would require this Court to make two other factual determinations: did the new entrances affect accessibility and were the new entrances altered to be "readily accessible."

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[3]DOT never made a determination on these matters in a proceeding or application process different than the Court's, but addressed the factual issue for the first and only time in its amicus brief.

As important as these questions and their answers are to disabled persons who use the Columbia Avenue Station, it stretches our imagination and creativity to understand how or why that fact-dependent issue could be important to this Court -- especially when the Court of Appeals remanded the case for a determination on three of the four and entrances.

3. Petitioners seriously mischaracterize the scope of the relief below. The Court of Appeals did not order -- nor have Respondents ever argued -- that the DOT regulation required the installation of elevators. It is a red-herring that Petitioners once again raise.

Respondents have consistently maintained that the regulation requires

accessibility to newly altered and reconstructed facilities -- not a specific type or mode of access. In their Court of Appeals' brief-in-chief, Respondents stated that "[i]f defendants had constructed a ramp, special lift, or any other accessible mechanism for persons in wheelchairs, accessibility might have been achieved without elevators. Defendants can decide how to make a facility accessible, but cannot disregard their duty to do so." (Brief of Appellants at 19)(emphasis in original). After DOT filed their amicus curiae brief, Respondents filed a response and reiterated that the only requirement was access -- not necessarily via elevators. (See Memorandum in Response to the Motion of the United

States For Leave to File an Amicus Brief, at 3-4).

Respondents have consistently stated throughout this litigation that elevators were only one way to make a facility accessible. More importantly, the Court of Appeals did not order an elevator but "note[d] that the City's original proposal, which was submitted to UMTA ... included a plan for construction of an elevator shaft. ..." (A-17)(emphasis added). The Court of Appeals correctly found that Petitioner's obligation was to make the "entrance ... usable by persons in wheelchairs" (Id.) (emphasis added). How the City decides to make it "usable" or accessible is up to the Petitioners, but no one has ever suggested that an elevator was mandatory and that issue is not in this case.

4. Petitioners suggest that the lower court's decision somehow is contrary to Section 504 decisions, (Petitioners' Writ of Certiorari at 11), citing Alexander v. Choate, 469 U.S. 287 (1985); and School Board v. Arline, ___ U.S. _____ 107 S.Ct. 1123 (1987). That claim flies directly in the face of the regulation in question and is contrary to the Choate and Arline decisions.

The regulation, 29 C.F.R. § 27.67(b), applies only to new construction or substantial alterations to existing facilities. Tnerefore, if Petitioners were not building a new subway station or making significant renovations that affected accessibility to an existing one, there would be no regulatory requirement of accessibility.

Petitioners are incorrect when they state that the lower court's decision imposes a requirement "to change the nature of its program by requiring inclusion of an accessible subway system." (A-12). Neither the Court of Appeals, the regulation, nor Respondents ever have suggested that.

To the contrary, the regulation and decision below are quite limited in their scope and narrow in application. Only if and when the City accepts federal assistance and builds or alters a facility in a way that affects accessibility, must it be made accessible, and even then only "to the maximum extent feasible."

Therefore, if no alterations occur, Petitioners have no legal duty regarding accessibility. If an alteration occurs

but does not affect accessibility, Petitioners have no duty (legally or factually) to make the facility accessible. Or, if an alteration occurs that does affect accessibility, but it is not practical to make the facility accessible, Petitioners have no legal or factual duty to make the alterations accessible. Nothing in the Circuit Court's opinion is to the contrary.

In the case of the Columbia Avenue station, Petitioners built new entrances or substantially reconfigured them. As a factual matter, the lower court saw pictures of the alterations, and, applying the regulation, held that petitioners readily could have made the facility accessible. If the City had spent 1.7% of the total $5.3 million cost

of the project, it would have had an accessible station.

At the very least, this is the type of reasonable accommodation this Court has repeatedly suggested that Section 504 requires. Indeed, in Alexander v. Choate, 469 U.S. at 300-301, n.20, the Court quoted with obvious approval the parallel HEW coordination rule that the DOT rule at issue here was modeled upon, 45 C.F.R. §§ 84.22 and 84.23, which, the Court stated, "requir[ed] that new buildings be readily accessible, [and] building alterations be accessible 'to the maximum extent feasible.'" Thus, there is nothing in the lower court's opinion or application of the regulation that is contrary to prior decisions of this Court. In fact, the prior decisions completely support Respondents' position.

II. The Decision of the Court of Appeals Does Not Conflict With Any Other Circuit.

Petitioners cite no cases that conflict with the decisions below. At most, they refer to American Public Transit Association v. Lewis, 655 F.2d 1272 (D.C. Cir. 1981), which voided regulations that are not in question in the present case. The APTA decision did not concern Subpart C of the DOT rule, 49 C.F.R. Part 27.

The only decision even close to the present case is Dopico v. Goldschmidt, 687 F.2d 644, 652 (2d Cir. 1982), which ruled that "some sort of action must be taken to recognize [physical barriers of public transportation], if only in the area of new construction or purchasing" (emphasis added). Respondents in the instant case seek no more than what the

Second Circuit stated. See also, DIA v. Pierce, 789 F.2d 1016, 1020 (3d Cir. 1985).

III. The Decision Below Has No "Adverse Practical Consequence" Except Implementing Both Congressional and DOT Policy.

Petitioners suggest that the Court of Appeals decision will result in "unprogrammed and haphazard" expenditures. That's hogwash.

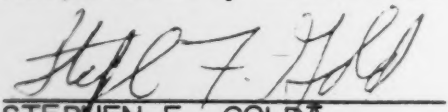
To the contrary, Congress and DOT have taken the rational long-run perspective. As a transportation system renovates a facility and its system, if the alterations affect accessibility and they are substantial, then they must be made accessible "to the maximum extent feasible." Over the next fifty years, the remaining stations in the City will be altered and renovated and, one by one,

they will probably become accessible. That the Columbia Avenue subway station was the first is seredipitous. However, Congress and DOT are fully aware that Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, requires "reasonable accommodations," at least over the long-run.

Conclusion

Because the instant case presents no important questions that would justify review by this Court and there is no conflict among the circuits, the petition for Writ of Certiorari should be denied.

Respectfully submitted,



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